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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Staggers Rail Act of 1980 limited the jurisdiction of state regulatory agencies over rates applicable to rail transportation wholly within a state. The Act provides for Interstate Commerce Commission approval of state rules and procedures, and for review by that agency of state decisions for conformity with federal standards. This is a case of first impression concerning the nature of the state-federal relationship structured by the Congress and the power of the ICC to substitute its rate reasonableness judgments—as distinguished from standards—on an *ad hoc* basis, for those of state commission. The questions presented are:

1. Did the Court of Appeals err in affirming ICC reversal of the decision of the ICC-certified Public Service Commission of Indiana prescribing a maximum reasonable intrastate rail rate predicated upon railroad cost of service findings and balanced consideration of carrier revenue inadequacy and carrier management efficiency?

2. Did the Court of Appeals err in concluding that the Indiana Commission violated the provisions of the Staggers Act *per se*, particularly where, as here, no implementing federal standards or procedures had been promulgated by the ICC for guidance of the state commissions?

3. Did the preemptive decision of the ICC, affirmed by the Court of Appeals, distort the carefully-structured role reserved to the states by the Staggers Act?

4. Did the ICC and Court of Appeals decisions properly interpret the maximum rate reasonableness standards of the Interstate Commerce Act, as amended by the Staggers Act, in failing to provide balanced regulatory protection for captive traffic?

PARTIES TO THE PROCEEDING

[RULE 21.1(b)]

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit were:

Public Service Company of Indiana, Inc.,
Peabody Coal Company,
Petitioners

United States of America,
Interstate Commerce Commission,
Respondents

National Association of Regulatory Utility Commissioners,

Louisville & Nashville Railroad Company,
Seaboard System Railroad, Inc.,
Association of American Railroads,
Intervenors

RULE 28.1 STATEMENT

Petitioner Public Service Company of Indiana, Inc., is an electric utility company with its principal office in Plainfield, Indiana. It has no parent company, no subsidiary company and no affiliated companies.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra* 1a-34a) is reported at 749 F.2d 753. The judgment and orders of the Court of Appeals denying the petitions for rehearing and suggestions of rehearing (App. B, C and D) en banc are not reported. The decisions of the Interstate Commerce Commission (App. E and F) are reported at 367 ICC 639 (first decision not printed).

JURISDICTION

The judgment of the Court of Appeals (App. B) was entered on November 23, 1984. Petitioner's timely-filed petition for rehearing and suggestion for rehearing en banc was denied on January 29, 1985 and this petition

is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(a) and 2350(a).

STATUTES INVOLVED

The relevant statutory provisions of the Interstate Commerce Act as amended by the Staggers Rail Act of 1980 are 49 U.S.C. 10101a; 10701a(b); 10704(a)(2); 10707a(e)(2)(C); 10709(d)(2) and (4), and 11501. Section 3 of the Staggers Rail Act of 1980 is likewise relevant. These provisions are set forth in Appendix G.

STATEMENT OF THE CASE

In the Staggers Rail Act of 1980, the Congress expanded upon the deregulation of the railroads first addressed in the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). It did so recognizing that for much railroad traffic the forces of competition could be relied upon to hold rail rates to reasonable levels. At the same time regulation of captive monopoly traffic—or in statutory terms "market dominant" traffic—was carefully preserved under a balanced regulatory scheme which reconciled legitimate railroad revenue needs under efficient management with shipper entitlement to protection against abusive monopoly pricing. The intrastate coal movement from the Universal Mine of Peabody Coal Company at Clinton, Indiana to the electric generating station of Public Service Company of Indiana (PSI) at Cayuga, Indiana via the former Louisville and Nashville Railroad Company[1] is undisputably market dominant traffic as to which maximum rate jurisdiction was preserved.

Hence, quite apart from the deregulation of competitive rail traffic, the monopoly traffic here involved was subject, as the court below properly recognized (App. 4a),

[1] L&N has since been merged into the Seaboard System Railroad, Inc.

to the initial jurisdiction of the State Commission. The Staggers Act further provided, however, for the exercise of state regulatory jurisdiction under procedures and standards fixed and certified by the ICC. To this end it is one of the stated policies of the Staggers Act "to *cooperate* with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle." 49 U.S.C. 10101a(9). Significantly, in implementing this policy statement in Section 214 of the Staggers Act (codified at 49 U.S.C. 11501), the Congress expressly rejected the more sweeping proposal of the original House bill that state authority be totally preempted by the Federal government.

Subsequent to the passage of the Staggers Act, PSI, jointly with its coal supplier Peabody, filed a complaint before the Public Service Commission of Indiana (PSCI) challenging the level of the L&N's intrastate rate on the 2.5 million ton coal movement to the Cayuga power plant. At the outset of that proceeding L&N conceded that the movement was market dominant, i.e., that it demonstrated both a lack of effective competition and a rate-variable cost ratio in excess of the jurisdictional threshold of 49 U.S.C. 10709(d)(2). L&N further stipulated "that there is no present definitive standard of maximum rate reasonableness." (PSCI Order p. 2, Findings Nos. 10 and 11).

With jurisdiction conceded, the Indiana Commission received evidence addressed to rate reasonableness, including costs of service, profitability of the movement, and system revenue adequacy and efficiency. Following a hearing for cross-examination, the State Commission issued its decision and order of September 17, 1982 embracing 71 detailed findings of fact and conclusions of law, with express reference to the Staggers Act. It directed that L&N's rate for this short 26-mile haul—in unit trains provided by the utility—be reduced from 94

cents to 65 cents per ton. The latter rate, equivalent to the then-applicable Staggers Act jurisdictional level, was substantially in excess of L&N's full costs of service, including return at current cost of capital levels,[2] PSCI, balancing L&N system revenue inadequacy against its findings of gross railroad management inefficiency as mandated by the Staggers Act, concluded that the carrier was not entitled to any greater measure of differential pricing on this captive coal movement than the very substantial amount already reflected in the jurisdictional level.[3]

Upon appeal by L&N pursuant to 49 U.S.C. 11501(c), the ICC, first in a decision of November 22, 1982 (later acknowledged to be "unclear"), and thereafter in a second opinion upon reopening, held that the State Commission had failed to apply federal standards. Accordingly, it found the existing L&N rate to be the "appropriate rate" within the meaning of that subsection. It was the thrust of the ICC's decisions that the Indiana Commission had accorded unwarranted weight to the evidence of inefficiency, given insufficient consideration to the counterbalancing factors of railroad differential pricing and revenue need and erred in prescribing the maximum reasonable rate at the jurisdictional threshold level.[4]

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[2] At the prescribed level L&N's return on investment was approximately 40 percent.

[3] It was recognized that L&N could increase the rate in subsequent years without challenge as the threshold increased from 165 percent to 180 percent of variable costs of service. (49 U.S.C. 10709)

[4] Commissioner Simmons (who was not on the Commission at the time of the second decision) dissented from the first decision. Chairman Taylor dissented from the second decision. It was the thrust of both dissents that the state could not reasonably be faulted for violating Federal standards where none had been articulated by the ICC.

Judicial review of the ICC's decisions was sought by PSI and Peabody. The National Association of Regulatory Utility Commissions intervened in support of petitioners. L&N and its successor Seaboard, joined by the Association of American Railroads, intervened in support of the ICC. The court of appeals affirmed the ICC's decision. It found the state commission's handling of the case "so one-sided" as to appear "result-oriented" and "well short of even-handed, correct and faithful application of Federal standards." (App. 18a). The Court stated further that "the Indiana Commission's factual handling of the efficiency question suggests manipulation." (App. 26a) It found no basis for the prescription of a rate equal to the jurisdictional level of 165 percent of variable costs. The court concluded that the ICC had correctly set aside the state decision because the latter had failed to apply Federal standards set forth in the Staggers Act itself, notwithstanding the court's recognition of ICC failure to articulate any such standards at the administrative level, and despite the exhaustive evidentiary findings of the Indiana Commission on statutory issues. In the court's view the balance structured by the Congress between railroad and shipper interests called for the weighing of a rate reduction versus improved efficiency. The state's decision was held to be deficient in this regard. (App. 24a-25a) The court, thus, accorded no weight to the balanced need for shipper protection against rate excesses, nor to relief from cross-subsidization of management inefficiency.

REASONS FOR GRANTING THE WRIT

This is a case of both first impression and national significance in that it involves delineation of the respective roles of the states, in exercising original jurisdiction over intrastate rail rates, and the Federal government, acting through the ICC, in reviewing state actions for conformity with Federal standards. Further, the

decision of the court of appeals conflicts with decisions of the same and other circuits.

The Staggers Act, rejecting the proposal of the original House bill for total preemption of state authority, undertook to strike a balance between state and federal authority. The legislative intent is clearly described in *Wheeling-Pittsburgh Steel Corporation v. ICC*, 723 F.2d 346, at 352-53 (3rd Cir., 1983) as follows:

> Section 11501(b) represented a compromise between interests favoring federal preemption of state authority over intrastate ratemaking and those advocating continuing state control over intrastate rates. As introduced in the House of Representatives, the predecessor to section 11501(b) would have divested the states of all authority over rates under the Commission's jurisdiction. Criticism of this provision by a number of state public service commissions led Congressman Broyhill to propose an amendment to the House bill preserving state jurisdiction over intrastate rates, subject to the condition that state regulatory authorities apply federal substantive rules and certify that their procedures are compatible with federal procedures. With only minor modification, this amendment became section 11501(b).
>
> Contrary to the ICC's contention, the legislative history of the Staggers Act indicates that the Act did not fundamentally reallocate federal and state ratemaking authority. Neither the Act nor its legislative history indicates any intention to overrule the Supreme Court's holding in *North Carolina* or to limits its application to challenges under section 11501(a). Rather, it appears that Congress, by rejecting federal preemption of intrastate rates, intended to preserve this traditional sphere of state competence. It follows, then, that the ICC must, in exercising its authority under section 11501(b) to preempt state rates for noncomfority with federal

> standards or procedures, make the basis for its preemption order clear. This is essential if state regulatory authorities are to fulfill the obligation vested in them by Congress to regulate intrastate rates in accordance with federal standards. (footnotes omitted)

To the same effect is the dissenting expression of Circuit Judge Scalia in *Illinois Commerce Commission, et al. v. Interstate Commerce Commission, et al.*, 749 F.2d 875 (D.C. Cir. 1984). Likewise referred to the Broyhill Amendment Judge Scalia stated:

> The amendment sought to "achieve a better balance between Federal regulation and State regulation," id., by permitting states to continue to exercise jurisdiction over intrastate rates if they applied the rate regulation standards set forth in the Staggers Act and if their proposed regulatory procedures were approved by the ICC as consistent with its own procedures. (749 F.2d at 888)

In that same expression Judge Scalia pointed to the significant distinction between "standards and procedures" of general application to which the states must conform, and the determination of rates in implementation of those procedures. In the latter regard the ICC itself has recognized that "the Act does not require lock-step duplication of ICC policy by the State." *Burlington Northern, et al.—Petition for Review of Order of Washington Utilities and Transportation Commission.* (Docket No. 38696 1981)

Although, as earlier observed, the scope of the jurisdiction of both Federal and State regulatory agencies was curtailed by deregulation of competitive rail traffic, the recent legislation specifically preserved—for captive traffic—the traditional requirement that the rates of railroads, like those of other public utilities, be reasonable. Costs of service, including authorized return, have been and continue to be the underlying linchpin of maxi-

mum rate regulation.[5] The Staggers Act did not sanctify departure from cost-based ratemaking.[6] To the contrary, the Conference Report states categorically the legislative intent that the ICC "continue . . . . to consider all the other factors which it presently considers in determining reasonableness." [7] It is not disputed that costs of service were then, in 1980, the underlying predicate for regulatory rate making. Clearly, therefore, the finding by the court of appeals that the Indiana Commission violated Federal standards cannot be justified on the ground that the state gave substantial weight to costs of service in its rate reasonableness determination.

Petitioner concedes that the Staggers Act, while preserving prior rate reasonableness standards, also mandated consideration of two factors, albeit under a balanced approach. One is railroad revenue adequacy "under honest economical and efficient management," (including certain pricing efficiency factors specified in the Long-Cannon Amendment (49 U.S.C. 10707a(e)(2)(C)). The other is the need for protection of shippers against excessive monopoly pricing of market dominant traffic. Both the ICC and the court below gave unwarranted weight to the goal of railroad revenue adequacy while disregarding the very railroad-shipper balance that is admitted to be the fundamental compromise of the Staggers Act.

Railroad efficiency is not the Staggers Act compromise offset to revenue adequacy the court below concluded. (App. 22a) Rather, efficiency is an integral part of and condition precedent to the pre-Staggers concept of

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[5] See: *Farmers Union Cent. Exchange, Inc. v. F.E.R.C.*, 734 F.2d 1486 at 1502 (D.C. Cir. 1984).

[6] It is not suggested that rates be made under an inflexible cost methodology ignoring non-cost considerations but simply that costs of service constitute the primary reasonableness inquiry.

[7] Conference Report to Accompany the Staggers Rail Act of 1980, Rept. No. 96-1430, 96th Cong., 2d Sess. September 29, 1980, at p. 94.

revenue adequacy. The Staggers Act balance is that between legitimate railroad *system wide* revenue needs "under honest, economical and efficient management" (49 U.S.C. 10704), on the one hand, and on the other hand, the right of individual shippers to protection against abusive pricing of specific traffic, *even if overall the railroad system is not earning adequate revenues on all traffic.* As the Congress stated in the Staggers Act Conference Report, mandated consideration of revenue adequacy "is not intended to imply that excessive profits for inadequate revenue carriers are reasonable," (p. 94) clearly referring to excessive profits on individual movements.[8] The foregoing Conference Report language was emphasized by the court of appeals in *Coal Exporters Association of the United States, Inc. v. U.S. and ICC,* 745 F.2d 76 at 98 (D.C. Cir., 1984) as a manifestation of "even stronger concern" on the part of the Congress that monopolistic rail carriers not extract excessive profits from captive traffic as to which regulation was preserved.

In short, it is the ICC and the court below that have failed to implement the Staggers Act standards. Moreover, the decision below erroneously affirmed an ICC approach to review of state regulatory decisions that permits the former agency to substitute its *ad hoc, de novo* judgment for that of the states to the point of effectively precluding any meaningful role for state regulation contrary to the legislative intent.[9]

I. The Court of Appeals Erred in Looking Only to The Staggers Act for Rate Reasonableness Standards And According Insufficient Weight to the Cost-Based Approach of the Indiana Commission

The decision below failed to recognize that the Staggers Act is not the totality of governing legislation in a rate reasonableness inquiry. While that Act added two

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[8] By definition, if a railroad is not earning adequate revenues, it cannot be earning excessive profits on its total business.

[9] See: *Kentucky Utilities Co. v. I.C.C.,* 721 F.2d 537 (6th Cir. 1983).

counter-balancing rate reasonableness considerations, i.e., railroad revenue adequacy and protection for captive shippers, the requirement that rail rates be reasonable (now embodied in 49 U.S.C. 10701a(b)(1) and 10709(c) has been an integral part of the Interstate Commerce Act since the Transportation Act of 1920. The search for Federal standards of rate reasonableness cannot, therefore, be confined to the Staggers Act as the Court of Appeals concluded.[10] As earlier noted, the Staggers Act legislative history makes clear the intent of Congress to preserve pre-existing rate reasonableness considerations.

The primary pre-Staggers rate reasonableness consideration for railroads, as for other utilities, was specific costs of service. (See decision of ICC served February 24, 1983 in Ex Parte No. 347 (Sub-No. 1) *Coal Rate Guidelines—Nationwide*, unprinted.) The Indiana Commission applied Federal standards in relying upon L&N costs of service for the PSI coal movement as the underlying predicate for its determinations. In this respect it was entirely consistent with decisions of both this Court and Courts of Appeals.

The delineation, over the decades, of a zone of reasonableness, where rates are neither non-compensatory nor excessive, is well-summarized in a recent decision respecting the level of pipeline rates under the original Interstate Commerce Act standards in *Farmers Union Central Exchange, Inc. v. Federal Energy Regulatory Commission, supra*. There, the court of appeals took note of opinions of this court in *Mobil Oil Corporation v. FPC*, 417 U.S. at 305-06, 316, 94 S. Ct. at 2344-45, 2349 and *FPC v. Hope Natural Gas Co.*, 320 U.S. at 602-03, 64 S. Ct. at 287-88, to hold that "the most useful and reliable starting point for rate regulation is an inquiry into

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[10] The court below, acknowledging the lack of rate reasonableness guidelines from the ICC, stated that this omission "does not leave a complete void" because standards are set by the *"Staggers Act itself."* (App. 17a, emphasis in decision)

costs." (734 F.2d at 1502). While, of course, not ruling out departures from "a rigid cost-based approach," the *Farmers Union* decision there referred further to the holding of this court in *Mobil Oil, supra,* that deviations from cost-based pricing must be reasonable and consistent with statutory authority. (734 F.2d at 1502).

In the instant proceeding, the Indiana Commission, consistent with time-honored rate reasonableness standards, began with its determination of railroad full costs of service, including return at the ICC-determined revenue adequacy level and then prescribed an above-full cost rate, after consideration of non-cost factors, at a level equal to the then Staggers Act jurisdictional rate-variable cost ratio. It will be demonstrated hereinafter that this measure of reasonableness, highly remunerative to L&N, was likewise consistent with Federal law, contrary to the views of the court below.

The cost-based approach taken by PSCI comported with the provisions of the Interstate Commerce Act, including the Staggers Act. It cannot be said to have violated any ICC-promulgated standards in implementation of the statute because concededly there were none. In this respect the ICC was remiss and its *ad hoc* approach upon review of the state decision, sanctioned by the court of appeals was unwarranted.

The ICC's failure to provide rate reasonableness standards for guidance of a challenging shipper was a major basis for remand in *Nekoosa Paper, Inc., et al. v. ICC,* 739 F.2d 258 (7th Cir. 1984). The Court of Appeals for the Third Circuit, in a case also involving review of a state rail rate determination, also called attention to the ICC's failure to articulate clear Federal standards for section 11501(c) proceedings," in remanding the latter's determination of an "appropriate rate." *Wheeling-Pittsburgh Steel Corp. v. ICC, supra,* (at 356-57). It was this absence of ICC rate reasonableness standards and, hence, "second-guessing" of the Indiana Commission that formed the basis for the dissenting expressions of Com-

missioner Simmons and Chairman Taylor in the instant proceeding.

The court of appeals decision here is entirely irreconcilable with that of the Sixth Circuit in *Kentucky Utilities Co. v. ICC, supra.* The holding in that case, which the court below undertook to distinguish on the ground that only a cost formula was involved, is alone persuasive of favorable action upon this petition.

The similarities between the *Kentucky Utilities* case and the instant proceeding are compelling. The *Kentucky Utilities* decision established principles for ICC review of state rail rate decisions that transcend the narrow cost methodology holding asserted by the court below as its rationale for distinguishing the two cases. In discussing the basis for ICC review the *Kentucky Utilities* court concluded that ICC could not properly hold that the state had failed to apply Federal standards if none had been promulgated by the former, absent which *ad hoc* ratemaking by the ICC was unwarranted and existing state standards remained in effect. (721 F.2d at 544). The court there rejected ICC reliance upon L&N system revenue need as requiring substantial pricing above the jurisdictional threshold (a major ICC thesis in both proceedings), distinguishing reasonableness from jurisdiction, and held that the ICC had failed to justify its choice of an increment above fully-allocated costs.[11] Here, the Indiana Commission fully explained its cost-based analysis and result. The ICC, on the other hand, merely blessed the existing L&N rate, entirely disregarding the long prevailing Federal standard of primary reliance upon costs for ratemaking.

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[11] For the PSI movement the Indiana Commission fixed a rate of 65 cents per ton, an increment of 9.2 units above full costs of 55.8 cents as determined by the state or 2.9 cents above full costs (62.1 cents) as later restated by the ICC. The ICC approved the existing L&N rate of 94 cents, 168 percent of full costs including return, as determined by PSCI and 151 percent of full costs as restated by the ICC.

II. The Court of Appeals Accorded Undue Weight to Railroad System Revenue Inadequacy

The court below, like the ICC, misread the carefully structured compromise balance of the Staggers Act in according undue weight to consideration of railroad revenue adequacy in ratemaking. (App. 14a-15a) Significantly omitted from the court of appeals recitation of the Staggers Act policy goals was section 3(4) of that Act which declares it to be one of the goals of the Congress "to provide a regulatory process that balances the need of carriers, shippers and the public." The Long-Cannon Amendment was but one manifestation of legislative concern for protection of captive shippers against abusive pricing.

Further, referring to the specific rail transportation policy of the Act now embodied in 49 U.S.C. 10101a (portions of which appear in the opinion below), the Staggers Act Conference Report [12] states:

> "The Conferees intend that this policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at *rates which do not exceed a reasonable maximum where there is an absence of effective competition.*" (Emphasis supplied)

Clearly, both the Interstate Commerce Act, before and after the Staggers Act, and the legislative history of the latter establish beyond question that *a shipper is entitled to a reasonable rate on its traffic irrespective of whether the railroad is deemed to be earning adequate revenues on its total traffic.*

This is the balance structured by the Staggers Act. Where such balance is lacking in a decision of the ICC that decision must be set aside. Lack of balance was the thrust of the remand in *Coal Exporters Association of the United States v. U.S. and ICC, supra,* where the court of appeals stated:

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[12] Conference Report, *supra* at 80.

> We vacate the Commission's exemption decision because the stated standard is a wholly unreasonable construction of the Staggers Act's accommodation between shipper and carrier interests. (745 F.2d at 95)

III. The Decisions Below Improperly Require Shippers to Quantify and Cure Railroad Inefficiency as a Condition Precedent to Rate Relief

The view of the court of appeals that the Staggers Act required balance between revenue adequacy and inefficiency (App. 22a, 25a), thus ignoring shipper entitlement to protection against excessive rates, caused the court to impose an intolerable burden of proof as to efficiency upon PSI. This is manifest in the discussion culminating in the statement that "in this case, the Indiana Commission never determined the amount of money that alleged inefficiencies cost the L&N. No evidence of dollar amounts appears to have been produced." (App. 25a) The ICC and the court below conceived it to be the burden of the shipper to establish that a rate reduction would not be "out of proportion to the alleged wrong." (App. 24a) The court's misconception of the balance struck by the Staggers Act is most clearly reflected in the statement that "The *balancing* aspect of the statute requires some attempt to tailor the remedy, rate reduction, to the goal, improving efficiency". (App. 25a, emphasis in decision, footnote omitted)

This is an impossible task in any case, requiring shipper analysis of all railroad traffic, data as to which is obviously in the possession of the carrier. PSI made such an effort through discovery but that effort was not productive. It is particularly unfair to penalize the shipper —and to criticize the Indiana Commission—for failure of proof where, as here, evidence was withheld. The ICC expressly found that L&N had withheld available Long-Cannon pricing data sought on discovery which it did no more than characterize as "disturbing." (App. 64a)

The Indiana Commission considered L&N efficiency, not only those comparisons with other railroads recited in the opinion below but also admissions on cross-examination that L&N pricing officers made rates on competitive traffic without consideration of related costs of service. It properly took cognizance of this evidence in evaluating L&N revenue adequacy because the statute expressly confines railroad claims of revenue need to those under "honest, economical and efficient management." (49 U.S.C. 10704(a)(2).

The decision of the same court of appeals in *Coal Exporters, supra*, did not interpret the Long-Cannon Amendment as imposing burdens upon the shipper of the same magnitude as those described here. There, referring to rate reasonableness determinations under 49 U.S.C. 10707a(e)(2)(c), the court said:

> The underlying logic of these instructions is that monopolistic discrimination should not be used to generate funds that could more efficiently and equitably be recovered elsewhere. (745 F.2d at 97)

The Indiana Commission clearly applied that logic.

IV. The Court of Appeals Failed to Address the Issue of Whether an Appropriate Rate Must be a Reasonable Rate

The Indiana Commission, as required by Federal standards, undertook to determine a reasonable rate. The ICC, however, did not. The court of appeals was obviously influenced in its appraisal of the PSCI rate prescription by the fact that it was equal to the then applicable (later increased) jurisdictional threshold. This was entirely proper where as here the rate prescribed was in excess of L&N full costs of service both as found by PSCI and as later restated by the ICC.

In condemning the rate set at the Staggers Act jurisdictional threshold, admittedly the lowest legal level, the

decision below is inconsistent with the holding of the Sixth Circuit in *Kentucky Utilities, supra.* There, in a well reasoned opinion, it was pointed out that the jurisdictional test is not a measure of reasonableness. Since the statute expressly provides that the jurisdictional level is neither a presumption of reasonableness nor unreasonableness (49 U.S.C. 10709(d)(4)(b), clearly PSCI did not violate any Federal standard in concluding that any higher rate would be unreasonable.[13]

The ICC, upon review under section 11501, concluded that the existing L&N rate was the "appropriate rate." The court of appeals noted that the Congress had failed to define that statutory term and that the ICC had not yet interpreted the relationship between an "appropriate rate" and a "reasonable rate," and found that the court need not do so. (App. 33a) This indecisive approach does not satisfy the statutory requirements. If the Indiana Commission was obliged to apply Federal standards in determining a maximum reasonable rate, the ICC had no less obligation upon undertaking to review the PSCI decision. Manifestly, it cannot be "appropriate" to authorize continuation of an unreasonable rate. The ICC shirked its duties in this respect.

The court below undertook to justify affirmance of the ICC's rate finding on the ground that PSI did not specifically criticize the ICC's cost findings. (App. 33a) There was no need to do so since the ICC, like PSCI, found full costs of service to be *less* than the rate fixed by PSCI and very substantially less than the rate found to be "appropriate". (L&N rate: 94 cents; ICC full costs: 62.1 cents)

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[13] PSCI, in fact, concluded that a rate equal to full costs should be the maximum but was obliged to authorize the higher jurisdictional level.

V. The Court of Appeals Accorded Undue Deference to ICC Expertise in the Circumstances of This Case

As earlier stated this is a case of first impression involving significant issues of interpretation of a recent statute, notably in the areas of rate reasonableness standards and state-Federal relations. These are matters best resolved by the courts. The suggested justification for deference, i.e. ". . . that the ICC has been setting railroad rates for close to a century now, and that its accumulated expertise in such matters far exceeds that of any court". (App. 33a) will not withstand scrutiny in this instance. The ICC has admittedly failed to develop any significant degree of expertise under the Staggers Act.

It has no standard of rate reasonableness; it has declined to undertake rulemaking for implementation of the Long-Cannon Amendment.[14] Hence, as the opinion below notes (App. 17a) the weighting of the various factors is as yet undetermined (leaving this for resolution by the states at present). Neither has the ICC determined whether finding an "appropriate rate" comports with its duty to prescribe a "reasonable rate." Certainly, the ICC's endorsement and reinstatement of the pre-existing L&N rate fails to reflect any rationalized ratemaking expertise. To the contrary it disregards the fact that during most of its near-century of accumulated expertise the ICC accorded proper and primary consideration to specific costs of service, fixing rates at a remunerative but not excessive level, just as the Indiana Commission undertook to do.

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[14] Arkansas Power & Light Co.—Petition to Institute Rulemaking Proceeding—Implementation of Long-Cannon Amendment to the Staggers Rail Act, Docket No. 38754.

CONCLUSION

This Court should grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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